STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1160

Douglas Kemp,
Appellant,

vs.

State Farm Insurance Company,
Respondent.

Filed February 6, 2023
Affirmed
Reilly, Judge

Ramsey County District Court
File No. 62-CV-22-1072

Patrick R. Gillespie, Michael P. Gillespie, Gillespie Law Offices, LLP, Rogers, Minnesota (for appellant)

Emilio R. Giuliani, Kimberly A. Hoffman, Labore, Giuliani, Shackleford & Jensen-Lea, Ltd., Minnetonka, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this underinsured-motorist benefits action, appellant-insured challenges the district court's grant of summary judgment to respondent-insurer based on collateral estoppel. Appellant argues that the arbitration agreement he entered in his tort action reserved his underinsured-motorist (UIM) claim for later adjudication and that the district

court erred in disregarding the context of the agreement and actions of the parties. Because the prior arbitration award collaterally estopped appellant from relitigating his damages, the district court did not err in granting summary judgment for respondent-insurer. Thus, we affirm.

FACTS

Appellant Douglas Kemp was involved in two motor vehicle accidents in 2016, on January 23 and September 17. Respondent State Farm Insurance Company insured Kemp during the relevant times. The driver in the first accident (Driver 1) carried liability insurance with limits of $250,000 and the driver in the second accident (Driver 2) carried liability insurance with limits of $50,000.

Kemp sued both Driver 1 and Driver 2 for his injuries arising from the two accidents. The parties agreed to settle the claims in binding arbitration. In May 2019 the parties executed an arbitration agreement titled "stipulation to arbitration to settle claim." The arbitration agreement stated, in relevant part:

> 1. Plaintiff Douglas Kemp and Defendant [Driver 1] and Defendant [Driver 2] understand that they have a constitutional right to a trial by jury but waive that right in favor of binding arbitration.
>
> . . .
>
> 3. Plaintiff and Defendant[s] understand and agree that the highest money damages that Plaintiff can be awarded for any and all claims against Defendants, following the hearing are policy limits ($250,000 for [Driver 1] and $50,000 for [Driver 2]) and the lowest money damages are $0.
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> 4. In the event that the arbitrator[']s award is between $0 and $250,000 for [Driver 1], inclusive, then the award shall be

> final and binding, and such amount will be Plaintiff's recovery as to [Driver 1] and her insurer . . . . If the Arbitrator's award is more than $250,000, Plaintiff's recovery as to [Driver 1] and her insurer . . . will be limited to $250,000.
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> 5. In the event that the arbitrator[']s award is between $0 and $50,000 for [Driver 2], inclusive, then the award shall be final and binding, and such amount will be Plaintiff's recovery as to [Driver 2] and his insurer . . . . If the Arbitrator's award is more than $50,000, Plaintiff's recovery as to [Driver 2] and his insurer . . . will be limited to $50,000.
>
> . . .
>
> 7. The arbitrator shall be the sole judge of all the issues of law and fact. There can be no appeal from any decision made by the arbitrator except a claim of fraud [or] that the arbitrator violated one of the provisions of this Agreement.
>
> . . .
>
> 13. If the arbitrator[']s award is greater than either Defendants['] liability limits, Plaintiff shall have the opportunity to protect his rights to underinsured motorist coverage by sending a Schmidt v. Clothier letter to Plaintiff's insurance carrier.
>
> 14. If the arbitrator[']s award is less than either Defendant[s'] liability limits, Plaintiff shall have the opportunity to send a precautionary Schmidt letter to protect his rights to underinsured motorist coverage.
>
> 15. This document contains the entire agreement between the parties. The terms of this agreement are contractual and not a mere recital. No promise, inducement or representation other than what is set forth in this agreement has been made, offered, or agreed upon by either party.

On May 2, Kemp sent a letter asking State Farm to contact Kemp's attorney if State Farm "would like the two underinsured motorist claims to be parties to this arbitration as well." State Farm did not respond and did not participate in the arbitration.

Kemp, Driver 1, and Driver 2 participated in arbitration. Driver 1 and Driver 2 stipulated that their negligence in each accident was the sole cause of the accidents. Following the hearing, the arbitrator found both Driver 1 and Driver 2 liable to Kemp for damages. The arbitrator found that Driver 1 was liable to Kemp for $34,615.00 in damages and that Driver 2 was liable to Kemp for $18,814.86 in damages. The damages included calculations for past and future (1) medical expenses, (2) wage loss and (3) pain and suffering. The award stated that Kemp "is entitled to judgment against each of the defendants consistent with the above findings."

Kemp sent a letter to State Farm informing it that the parties "negotiated an agreement to settle third party liability claims against [Driver 2] for $18,814.86, [$31,185.14][1] less than policy limits." The letter stated that:

> In accordance with *Schmidt v. Clothier and Safeco*, 338 N.W.2d 256 (Minn. 1983), you have thirty (30) days in which to exchange your check for that of the third party's insurance carrier in order to preserve your rights of subrogation. If we have not received your check within 30 days, we will execute releases in favor of the defendant and their insurer.

State Farm replied to the letter stating that "[a]fter thorough investigation, we have concluded that we will waive all subrogation rights, as they relate to [Driver 2]. Please accept this correspondence as compliance with the 'Schmidt Notice' . . . ."

Later Kemp signed a full and final release of all claims against Driver 1 and Driver 2 arising out of the two accidents. He acknowledged receipt of the payment of the

[1] The letter stated that the amount was "$231,185.14 less," but the parties agree that amount is actually $31,185.14, less than the policy limits of $50,000. The reference to "$231,185.14" appears to be a typographical error.

arbitration award. The release agreement stated that "[t]his release does not preclude the undersigned from pursuing a claim for no-fault benefits or UIM benefits against their insurer."

Two years later, Kemp sued State Farm alleging breach of contract for failing to pay UIM benefits. Kemp alleges that he is entitled to UIM benefits for injuries and damages arising out of the September 2016 accident with Driver 2. State Farm filed a motion for summary judgment, arguing that Kemp already litigated the damages issue and received a final judgment from a qualified arbitrator. Kemp argued that the arbitration constituted a settlement not intended to determine the full amount of damages.

The district court granted State Farm's motion for summary judgment, finding that Kemp was collaterally estopped from relitigating the amount of damages. This appeal follows.

DECISION

Kemp challenges the district court's decision granting summary judgment for State Farm. This court reviews "the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). Kemp's argument focuses on the district court's legal analysis. He contends that the district court erred in determining that his claim is barred by collateral estoppel because (1) the issue here is different from any issue decided in arbitration and (2) the arbitration award was not a final judgment. Whether collateral estoppel applies is

a mixed question of fact and law, which we review de novo. *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996).

The doctrine of collateral estoppel, also known as "issue preclusion," "prevent[s] litigants from relitigating in subsequent actions identical issues that were determined in a prior action." *Heine v. Simon*, 702 N.W.2d 752, 761 (Minn. 2005). Courts should not rigidly apply collateral estoppel but should focus on whether application of the doctrine "would work an injustice on the party against whom [collateral estoppel] is urged." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). When there has been a prior arbitration award against the tortfeasors or the tortfeasors' liability insurer, "the arbitral decision may collaterally estop both the injured drivers and their underinsured motorist carriers from relitigating the damages issue." *Butzer v. Allstate Ins. Co.*, 567 N.W.2d 534, 536 (Minn. App. 1997).

Collateral estoppel applies if all four of these elements are met:

> (1) the issue to be addressed is identical to an issue in a prior adjudication; (2) there was a final judgment on the merits in the prior adjudication; (3) the estopped party was a party to or in privity with a party to the prior adjudication; and (4) the estopped party received a full and fair opportunity to be heard on the adjudicated issue.

State Farm Mut. Auto. Ins. Co. v. Lennartson, 872 N.W.2d 524, 534 (Minn. 2015). In this case, the parties agree that Kemp was a party to the prior adjudication and had a full opportunity to be heard before the arbitrator. But Kemp disputes that (1) the arbitrator addressed an issue identical to the issue here and (2) whether there is a final judgment on the merits in the prior action. We address each argument in turn.

Identical Issues

The first element that must be shown in collateral estoppel is that the issues are identical to the issues litigated in the prior adjudication. *Id.* This element is met only if the same issue was "necessary and essential to the resulting judgment" in the prior action, and it was "distinctly contested and directly determined" in that action. *Hauschildt*, 686 N.W.2d at 837-38. Issues are considered identical "when the issues presented by the current litigation are in substance the same as those resolved." *All Finish Concrete Inc. v. Erickson*, 899 N.W.2d 557, 567 (Minn. App. 2017).

Kemp argues that the parties to the arbitration did not intend for the settlement agreement to include UIM claims. Thus, he contends that whether he is entitled to UIM damages is a separate issue. But Kemp misconstrues the doctrine of collateral estoppel, or "issue preclusion" with the doctrine of res judicata, or "claim preclusion." Collateral estoppel concerns *issues* that were litigated and decided in a prior action, while res judicata "concerns circumstances giving rise to a *claim* and precludes subsequent litigation—regardless of whether a particular issue or legal theory was actually litigated." *Hauschildt*, 686 N.W.2d at 840 (emphasis added).

In *Butzer*, this court determined that a prior arbitration award collaterally estopped the appellants from bringing UIM claims against their insurer. 567 N.W.2d at 538. In doing so, we determined that the issue of damages in both cases was identical, and that the arbitrator fully determined the amount of damages suffered by the appellants. *Id.* at 537. And we concluded "that a full presentation of damages evidence in the tort action would increase the complexity of recovering both personal injury proceeds and underinsured

motorist benefits. Rather, by encouraging duplicative proceedings to determine the amount of damages, appellants' position likely would create an overall increase in litigation on identical issues." *Id.*

In this case, Kemp argues that his UIM claim presents a distinct damages issue. He argues that because the arbitration agreement did not specify that it would be binding as to the amount of damages, then the issue of damages was not completely decided. We are not persuaded. The parties in the prior arbitration agreed that the arbitrator would be the sole judge of *all the issues of law and fact* and would decide the damages issue. As in *Butzer*, the parties also agreed that the arbitrator would not be limited in the award of damages. In other words, the arbitrator could decide to award damages from $0 to any amount above policy limits for Driver 1 or Driver 2 or both, based on the evidence and parties' stipulations. If the damages award had been more than either driver's policy limits, Kemp could pursue UIM benefits through State Farm. But the arbitrator found that Driver 1 was liable to Kemp in the amount of $34,615.00 and that Driver 2 was liable in the amount of $18,814.86, which were amounts under the policy limits of each driver. When the arbitrator calculated Kemp's damages, he considered both past and future damages for medical expenses, lost wages, and pain and suffering. And the respective insurers paid the damages awards to Kemp.

In sum, the arbitrator fully decided the damages issue. Thus, we conclude that the issue of damages here is identical to the issue of damages in the arbitration. The first element of collateral estoppel is satisfied.

Final judgment on the merits

Kemp also argues that the arbitration agreement was not a final judgment on the merits. Instead, he contends that the arbitration agreement was a settlement which did not foreclose him from pursuing UIM benefits from State Farm.

Unlike tort actions for damages, a UIM claim "is a contract action for first party benefits against one's own insurer." *Emp.'s Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 856 (Minn. 1993). While both tort and contract actions raise issues of damages and tort liability, "pursuing one remedy over another does not result in a waiver of the remedy not chosen." *Id.* But the doctrine of collateral estoppel may bar the party from pursuing UIM benefits in some cases. *Id.* Before bringing a UIM claim, a party must recover from the tortfeasor's liability insurance. *George v. Evenson*, 754 N.W.2d 335, 340 (Minn. 2008). The supreme court has articulated two ways by which that condition precedent can be satisfied:

> [T]he injured claimant can either (1) pursue a tort claim to a conclusion in a district court action, and then, if the judgment exceeds the liability limits, pursue underinsured benefits; or (2) settle the tort claim for "the best settlement," give a *Schmidt–Clothier* notice to the underinsurer, and then maintain a claim for underinsured benefits.

Emp.'s Mut. Cos., 495 N.W.2d at 857.

Under the first method, the notice requirement to the insurer is governed by *Malmin v. Minn. Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996). The insurance carrier is provided notice of the insured's personal injury claim, gets a chance to intervene, and is bound by the damages award. *Malmin*, 552 N.W.2d at 728. If proper *Malmin* notice is

given, a party can recover UIM benefits from their insurer should the verdict exceed the tortfeasor's insurance coverage. *See id.* (binding Malmin's UIM insurer). But once damages are determined, even through arbitration, the insured and UIM carrier are collaterally estopped from relitigating the issue. *Butzer*, 567 N.W.2d at 538. Under the second method, after the injured party and tortfeasor settle, a UIM carrier can "substitute its payment to the insured in an amount equal to the tentative settlement" and then, as subrogee, maintain the insured's tort action against the tortfeasor. *Schmidt*, 338 N.W.2d at 263. "We interpret an arbitration agreement to give effect to the intention of the parties as expressed in the language they used in drafting the whole agreement." *George*, 754 N.W.2d at 341 (quotation omitted).

Kemp argues that the parties to the arbitration agreement intended to enter into a *Schmidt*-type settlement agreement and reserve UIM claims for later adjudication. Thus, the arbitration agreement was not a final judgment on the merits as governed by *Malmin*. We do not agree. An arbitration proceeding may function "as either a settlement or a conclusion of a tort action" under *Malmin* or *Schmidt*. *Kluball v. Am. Fam. Mut. Ins. Co.,* 706 N.W.2d 912, 916 (Minn. App. 2005). But "an insured must characterize an arbitration award as either a settlement or a conclusion of a tort action and may not rely on both characterizations when pursuing UIM benefits." *Id.*

Here, the arbitration award was not a settlement allowing for later pursuit of UIM claims under *Schmidt* but was a final judgment on the merits. The arbitration agreement contemplated the arbitrator awarding more than the tortfeasors' policy limits but also contemplated the arbitrator awarding Kemp no damages. *Cf. Murray v. Puls*, 690 N.W.2d

337, 340 (Minn. App. 2004) (determining that an arbitration agreement limiting damages to a low of $20,000 and a high of $100,000 was a *Schmidt*-type settlement reserving UIM claims for later adjudication), *rev. denied* (Minn. Mar. 15, 2005). The agreement stated that the parties "understand that they have a constitutional right to a trial by jury," but that they waived their right to a jury trial in favor of binding arbitration. The parties agreed that the arbitrator would be the "sole judge of all the issues of law and fact" including damages. *See Butzer*, 567 N.W.2d at 538 ("When a party arbitrates a claim that includes an issue on the amount of damages, that party waives his right to a jury trial on that issue against defendants who were not parties to the arbitration." (quotation omitted)). The arbitrator then decided past and future damages based on the parties' stipulations and evidence. The award was under the drivers' policy limits. And the drivers' insurers paid Kemp the full amount of the damages award for past and future damages for medical expenses, lost wages, and pain and suffering.

Kemp argues that language included in the arbitration agreement providing that Kemp "shall have the opportunity to send a precautionary *Schmidt* letter to protect his rights to underinsured motorist coverage," establishes that the parties reserved their right to seek more than the arbitrator's award. But the language does not effectively make the arbitration agreement a settlement. As in *Butzer*, we conclude that the clause carries no legal significance but instead put State Farm on notice of Kemp's intent to seek UIM benefits if the arbitrator's award of damages exceeded the policy limits of either driver's insurance policy. *See id.* (stating that "[t]here is no evident relationship of the [*Schmidt*] notice mentioned in the agreement to the circumstances of an arbitrator's award").

Before the final arbitration, Kemp sent notice of the arbitration and invited State Farm to participate, but State Farm declined. This notice inviting State Farm to intervene served as a *Malmin* notice. State Farm, like Kemp, is bound by the final damages award. Had the award been higher than the policy limits of either driver, Kemp could have pursued State Farm for the UIM benefits in the amount exceeding the policy limits. But both awards were less than the drivers' policy limits and there are no UIM damages to be awarded. Kemp may not now relitigate the damages issue because the arbitration award serves as a final judgment on the merits.

In sum, the elements of collateral estoppel are met, and Kemp is barred from relitigating the damages issue. Thus, the district court did not err in granting summary judgment for State Farm.

Affirmed.